Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 78-239

In the Supreme Court of the United States

OCTOBER TERM, 1978

EUGENE F. DIAMOND, M.D.,

Appellant,

vs.

RALPH M. WYNN, M.D., JERZY JOZEF (GEORGE) BIEZENSKI, M.D.; and MARVIN ROSNER, M.D., ALLAN G. CHARLES, M.D., YOLANDA ADLER, M.D., and MARY ZOE, individually and on behalf of all others similarly situated,

Appellees,

and

JOHN S. LONG, M.D., on behalf of himself and all others similarly situated; ILLINOIS ABORTION SERVICES COUNCIL, an Illinois not-for-profit corporation, on behalf of themselves and all others similarly situated,

Appellees.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

REPLY TO MOTION TO DISMISS

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EUGENE F. DIAMOND, M.D.,

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RALPH M. WYNN, M.D., JERZY JOZEF (GEORGE) BIEZENSKI, M.D.; and MARVIN ROSNER, M.D., ALLAN G. CHARLES, M.D., YOLANDA ADLER, M.D., and MARY ZOE, individually and on behalf of all others similarly situated,

Appellees,

and

JOHN S. LONG, M.D., on behalf of himself and all others similarly situated; ILLINOIS ABORTION SERVICES COUNCIL, an Illinois not-for-profit corporation, on behalf of themselves and all others similarly situated,

Appellees.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

REPLY TO MOTION TO DISMISS

All contentions raised in the Motion to Dismiss are thoroughly dealt with in the Jurisdictional Statement, with the exception of Plaintiffs-Appellees' attack on Appellant's intervention.

ARGUMENT

Plaintiffs-Appellees' Attempt to Overturn the Three Judge Court's Order Appointing the Appellant Guardian Ad Litem And Permitting Him to Intervene Requires an Appeal And Is Not Appropriate in a Motion to Dismiss.

Plaintiffs-Appellees initially suggest that Appellant Diamond's prosecution of this appeal as guardian ad litem for infants who survive the abortion procedure and for unborn children "is totally different from the purported basis of his intervention in the Three Judge Court." (Motion to Dismiss at 9.) This misrepresents the Three Judge Court's decision to permit Dr. Diamond's intervention. (*See* Order of December 2, 1975, printed as the Appendix to this reply brief; *see also* the Three Judge Court opinion at App. 4 of Jurisdictional Statement.)

The rest of Plaintiffs-Appellees' contentions constitute a collateral attack on the ruling of the court below allowing Appellant Diamond to participate as a party defendant, which ruling they have not appealed. If Plaintiffs-Appellees wished to seek appellate review of the order allowing intervention, the appropriate means by which to do so was to appeal from that order to this Court, giving the Court the benefit of full briefs and argument on the merits of the question. *Allen Calculators Inc.* v. *National Cash Register Co.*, 322 U.S. 137, 142 (1944). Thus, those portions of the Motion to Dismiss which attack the order of the Three Judge Court should be disregarded.

CONCLUSION

For the foregoing reasons, Appellants respectfully submit that this Court should note jurisdiction in this case and set it for plenary review with briefs and oral arguments on the merits.

Respectfully submitted,

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Attorneys for
Eugene F. Diamond, M.D.

STATE OF ILLINOIS)
) ss.
CITY OF CHICAGO)

CERTIFICATE OF SERVICE

I, John D. Gorby, one of the attorneys for Appellant Eugene F. Diamond, M.D., being a member of the Bar of the Supreme Court of the United States, do hereby certify I have caused a true and correct copy of this Reply to Motion to Dismiss to be served upon Appellants and Appellees, they being all the parties of record, by depositing such Reply to Motion to Dismiss in a United States Post Office mailbox, with first-class postage prepaid, addressed to Bernard Carey, State's Attorney of Cook County, c/o John Dienner, Assistant State's Attorney, 500 Daley Center, Chicago IL 60602, attorney for Appellant; and David Goldberger, Lois Lipton, 5 S. Wabash, #1516, Chicago IL 60603; Merle L. Royce, II, 1 First National Plaza, #4800, Chicago IL 60603; Ralph E. Brown, 104 S. Michigan, Chicago IL 60603; and R. Peter Carey, 10 South LaSalle Street, Chicago IL 60603, attorneys for Appellees, this 21st day of September, 1978.

.....

John D. Gorby

APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CIVIL ACTION — NO. 75 C 3975

RALPH M. WYNN, M.D.; JERZY JOZEF (George) BIEZENSKI, M.D.; and MARVIN ROSNER, M.D.,
Plaintiffs,

vs.

WILLIAM J. SCOTT, Attorney General of the State of Illinois; BERNARD CAREY, State's Attorney for County of Cook, Illinois; and JOYCE C. LASHOF, M.D., Director of the Department of Public Health of the State of Illinois,
Defendants,

and

CIVIL ACTION — NO. 75 C 3981 (Related Case)

JOHN S. LONG, M.D., on behalf of himself and all others similarly situated; ILLINOIS ABORTION SERVICES COUNCIL, an Illinois not-for-profit corporation, and MID-WEST POPULATION CENTER, an Illinois not-for-profit corporation, on behalf of themselves and all others similarly situated,
Plaintiffs,

vs.

WILLIAM J. SCOTT, Attorney General of the State of Illinois; BERNARD CAREY, State's Attorney for County of Cook, Illinois; and JOYCE C. LASHOF, M.D., Director of the Department of Public Health of the State of Illinois,
Defendants.

O R D E R

This matter having come on to be heard on the Petition of Eugene F. Diamond, M.D. to intervene and for his appointment as guardian ad litem, the Court having heard argument of counsel, having reviewed the affidavits and briefs;

IT IS HEREBY ORDERED that the Motion of Eugene F. Diamond, M.D. to intervene in this cause is granted;

IT IS FURTHER ORDERED that Eugene F. Diamond, M.D. is herewith appointed guardian ad litem (1) for the class of unborn viable children; (2) for the class of unborn children whether viable or not; and (3) for the class of children born alive as a result of legal abortions; for the purpose of representing these classes in this litigation;

IT IS FURTHER ORDERED that Dr. Diamond's Motion to intervene on behalf of himself as a parent and for the class of parents who will be affected by the statute is granted;

IT IS FURTHER ORDERED that Dr. Diamond's Motion for leave to intervene on behalf of himself as husband and spouse and for the class of husbands and spouses affected by the statute is granted;

IT IS FURTHER ORDERED that Dr. Diamond is granted leave to file within twenty [*sic*] (10) days a pleading on behalf of each of the classes which he represents.

ORDERED:

/s/ *Prentice Marshall*

/s/ *Alfred Kirkland*

December 2, 1975
Date